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IN THE  
**Supreme Court of the United States**

—  
No. 581.  
—

COMMISSIONER OF INTERNAL REVENUE,

v.

COURT HOLDING COMPANY.

—  
On Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Fifth Circuit.

—  
**BRIEF BY THE COURT HOLDING COMPANY IN OPPO-  
SITION TO PETITION FOR WRIT OF CERTIORARI  
FILED BY COMMISSIONER OF INTERNAL REVE-  
NUE.**

—  
MAURICE KAY,

*Attorney for Respondent  
On Review.*

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**OPINIONS BELOW.**

The Opinion of the Tax Court of the United States (R. 86-102) is reported in 2 T. C. 531. The Opinion of the Circuit Court of Appeals (R. 117-122) is reported in 143 F 2d. 823.

## JURISDICTION.

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on July 11, 1944 (R. 123). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTION PRESENTED.

Whether the gain derived from the sale of the assets received by the shareholders of the Court Holding Company, a Corporation, after the shareholders had received such property in complete liquidation of the Corporation, was taxable to them as individuals or taxable to the Corporation.

## STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code:

Sec. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. \* \* \* (26 U. S. C. 22).

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over

all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

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Sec. 19.22 (a)-21. *Gross income of corporation in liquidation.*—When a corporation is dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts, and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44(d) and section 19.44-5. (See further section 19.52-2.)

### **STATEMENT.**

The facts as found by the Tax Court are fully stated in the decision of that Court reported in 2 TC 531. Summarizing, the facts are that the taxpayer corporation was organized under the laws of Florida for the purpose of taking title to certain real estate known as the Mayfield Court Apartments. The corporation was a mere holding company and its only asset was the Mayfield Court Apartments. Its only business was the leasing of the building, consisting of a single lease transaction. Of the 50 shares of capital stock outstanding, 48 were owned by Minnie Miller and two shares by her husband, Louis Miller. Lotis Miller was president of the corporation. Harry Miller, a son, was secretary. The rental was due \$2,000 October 1, \$1,000 December 15, \$1,500 January 15, \$2,000 February 1, \$2,000 February 20 for each year. There was an initial deposit also in the amount of \$2,000 to secure the general performance of the lease. During February of 1940 one M. W. Fine began negotiations with Louis Miller, president of the corporation, for the purchase of the building. The purchase

price had been orally agreed to between these two individuals. No contract had been entered into. On February 23, 1940, the prospective purchaser was notified that the corporation could not and would not make the sale for the reason that very large income taxes would result. On the afternoon of February 23, 1940 the three directors of the corporation met with their accountant and in a formal directors meeting resolved that the corporation should declare a dividend payable in the assets of the corporation in complete liquidation and surrender of all the outstanding corporate stock. A resolution was then passed declaring the dividend "payable in all the assets of the corporation (describing the building and its contents) subject to a first mortgage \* \* \* and a second mortgage \* \* \* and further subject to the lease between the corporation and Aaron and Regina Feiwish \* \* \* in complete liquidation and surrender of all the corporate stock of the corporation held by Louis and Minnie Miller." The formal stockholders meeting was then held at which the resolution of the directors was ratified and confirmed; Louis Miller and Minnie Miller both signing the minutes. Thereupon the same afternoon the corporation executed its deed to the property to Louis Miller and Minnie Miller in accordance with the directors minutes. This deed was duly recorded. On February 26, 1940 the attorney for the prospective purchaser drew a contract providing for the same purchase price and conditions that had been agreed upon on February 20 by the president with certain minor changes. The contract acknowledged the receipt of a deposit of \$1,000 and provided that if the title was approved other payments were to be made and credit allowed for \$2,000 which amount had been held on deposit to secure the lease. The Tax Court found as a fact that the \$1,000 paid, the receipt of which was acknowledged in the contract, was the application of a check for \$1,000 dated January 5 by Aaron Feiwish to the Millers. Title was transferred by the Millers to Mrs. Fine on April 1, 1940. The corporation has owned no property since the transfer of its assets, and has done no business.

**ARGUMENT.**

The petitioner on review sets forth in his petition that the Circuit Court reached its decision reversing the Tax Court upon two (incompatible controlling) factors. (Br. 8), namely, (1) that the taxpayer "called off" the oral agreement, and (2) that the taxpayer did not legally bind itself in writing and accordingly was free to declare that it would not "go forward with the sale" in its own name but would pass title to the stockholders in the form of a liquidation distribution, for the sole purpose of enabling them to go forward upon the "same terms" in their own names.

The respondent agrees with the petitioner on review that it is the function of the Tax Court and not the Circuit Court of Appeals on review to weigh the evidence and find the facts, (*Dobson v. Commissioner* 320 U. S. 489) The respondent further agrees that the Circuit Court on review may not substitute its own views of fact different from those found by the Tax Court when the findings of the Tax Court are based upon some evidence in the record. The case of *Dobson v. Commissioner, Supra*, did not, however, go so far as to hold that the Tax Court could make findings which were not based upon evidence or could make findings contrary to the evidence and that such findings would be binding upon Circuit Court of Appeals on review. This Court has never gone so far. The findings of a Tax Court to be effective must not be contrary to the evidence and must be supported by the evidence. In the instant case the Tax Court held that the \$1,000 paid on January 5, 1940 was the deposit of \$1,000 referred to in the contract, the receipt of which is acknowledged in the contract of February 26, 1940. In this respect the finding of the Tax Court is contrary to the evidence in the case and there is no evidence to support the findings of the Tax Court. This is demonstrated by the fact that the negotiations for the sale of the property had not started by the president of the corporation and proposed purchaser until February 20, 1940.



And the evidence further shows that the \$1,000 paid on January 5, 1940 was rental. There is no evidence to the contrary and the finding of the Board that this \$1,000 was paid as a deposit on the purchase price is contrary to all the evidence.

In the Brief in behalf of the Commissioner filed in this Court, great reliance is placed on the above finding of fact by the Tax Court. This is one of the pillars upon which the Tax Court based its opinion.

It is not even claimed by the Petitioner on review that a binding contract was ever entered into for the sale of the property by the corporation. The most that is claimed is that an oral contract was entered into in behalf of the corporation which was never made a binding agreement. Instead of making it a binding agreement the corporation, through its proper officers, decided not to sell the property and it is not claimed that the corporation actually made the sale. The Tax Court held that the individual stockholders agreed and bound themselves as individuals to perform the so-called oral agreement of the president of the corporation, which the corporation itself by proper action had declined to make and bind the corporation. Admittedly the sale was made by the stockholders themselves as individuals. Were they in any way obligated to carry out the oral agreement in behalf of the corporation? Or were they acting in behalf of the corporation in making this sale? If these two questions are answered in the negative then there is no basis for reversing the decision of the Court below. On these two questions there is no conflict in the evidence. The evidence is undisputed. Yet the Tax Court made its findings contrary to this undisputed evidence.

The corporation itself clearly was not legally bound by any oral agreement under the Florida law. The decision of the Circuit Court of Appeals only states the long established law of the State. The corporation deliberately declined to enter into a binding agreement to sell or to make a sale. How then could it be said that the stockholders were later so obligated. The stockholders received the property

in complete liquidation of the corporation and after its receipt made their own contract and made their own sale, received the consideration therefor and included the profits in their individual income tax returns.

When the Tax Court found that the stockholders carried out the agreement made by the corporation and not an agreement made by themselves it committed an error of law in that such findings are not supported by the evidence. They are only conclusions not based on facts or evidence. The statement by the Tax Court that it "was always intended and understood by the parties (stockholders and purchaser) that the sale would be made exactly as agreed by the oral agreement of the president of the corporation except for change in identity of the vendor" is only an assumption. The fact is that the stockholders received the assets with no binding agreement by the president. The president himself was only the owner of two shares of the stock. There is no evidence whatever in this record as to what the stockholders themselves intended to do with the assets when they received them in liquidation. It was their own decision which they carried out as individuals. There is not a word of evidence that the stockholders were acting as agents for the corporation when they made the sale of the property. The statement in the Brief of the petitioner on review that the Lower Court (the Court of Appeals) assumed that the corporation was "actually" liquidated, was the substitution of the Court's view for that of the Tax Court, is not warranted as the record clearly discloses that the corporation was in fact liquidated and there is not any evidence of any character to the contrary. When the Circuit Court of Appeals therefore stated that the corporation was actually liquidated it was only following the undisputed facts and the undisputed evidence in the record notwithstanding the assumptions made by the Tax Court to the contrary. The statement by the Tax Court that the liquidation was not bona fide but "were formal devices to which resort was had only in the attempt to make the transaction

appear to be other than what it was" is only an assumption or surmise by the Tax Court and is not a fact established by evidence in the case. At most such statements are only opinions of the Tax Court as distinguished from facts. Such opinions, assumptions or surmises are not binding upon the Circuit Court of Appeals on review unless established by evidence. The Court on review had the right to determine the basis for such opinion and inquire as to whether the facts and the evidence supported it. This is not in any way in conflict with opinion of this Court in *Dobson v. Commissioner*, 320 U. S. 489.

In finding that the oral agreement was "called off" the Court below (Circuit Court of Appeals) was only acting on undisputed evidence in the case.

It is stated in the Brief of petitioner on review that if a corporation sells its property it is taxable on the resultant gain. The statute so provides. It is equally true, however, that if the corporation does not sell its property it is not liable for taxes as if it had sold it.

It is contended that the liquidation of the corporation in this case was a mere sham, resorted to in order to avoid taxes. None of the cases relied on in the Brief of petitioner on review are actually in point and are clearly distinguishable from the facts in this case. The statements made by the Tax Court in this regard are only arguments and not facts and the Court of Appeals on review had the statutory jurisdiction and duty to review the Tax Court decision on questions of law. It is equally clear that findings of fact or opinions of the Tax Court not based on evidence or contrary to the evidence constitutes error of law which the Court on review had the right and duty to correct. This is what the Court below has done. The Tax Court's surmises and arguments are not findings of fact nor are the Court's opinions or conclusions without the factual foundation.

\* It is submitted that there is no question of law of general interest to warrant this Court granting the Writ. It is in

fact only the correct application of law to the facts. The law is clear. Only the facts are involved. This does not constitute such a case of law of general interest as to warrant the granting of Certiorari by this Court.

In view of the foregoing it is apparent that there is in fact no conflict of decisions of the lower Court on questions of law involved. It is only correct application of the facts of the law and the real question is whether the decision of the Tax Court was supported by the evidence or is in accord with the evidence and not contrary thereto.

This is the basis upon which the Circuit Court of Appeals entertained jurisdiction and corrected the errors of law made by the Tax Court.

#### **CONCLUSION.**

It is respectfully submitted that this petition for Writ of Certiorari should be denied.

A handwritten signature in cursive script, reading "Maurice Kay". The signature is written in dark ink and is positioned above a dotted line.

MAURICE KAY,

*Attorney for Respondent  
On Review.*